IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1751

WILLIAM LACEY,

Petitioner,

vs.

UNITED STATES,

Respondent.

Petition For A Writ of Certiorari To the United States Court of Appeals For the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, William Lacey, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 31, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 21, 1978. A timely Petition for Rehearing was denied on May 9, 1978. This Petition for Certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. When a jury has previously announced that it is deadlocked, has been given a supplemental *Allen* type charge, and has, after deliberating further, once again announced that it is unable to reach a verdict, is the reading of a second *Allen* type charge unconstitutionally coercive?

2. What standards should be applied by the Federal Courts in determining whether supplemental jury charges, given after a jury has announced deadlock, are impermissibly coercive?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

AMENDMENT VI

In all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall previously have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

In September of 1977 petitioner was tried in the Federal District Court for the Southern District of New York on the charge of possession with intent to distribute cocaine. The prosecution contended that the petitioner had "exacted" approximately six ounces of cocaine from three individuals who had smuggled the drugs into this country by going to their apartment and threatening violence. In support of this contention the government produced these three smugglers as its major witnesses. Two of the prosecution witnesses, individuals who the prosecution conceded were "not totally reliable and were not upstanding pillars of the community" (Tr. 9 (4)) identified the petitioner as the one who had forcibly taken six ounces of cocaine from them. In direct contradiction to the testimony of these witnesses was the testimony of the third smuggler, also an eyewitness to the transaction. This prosecution witness testified that he had been present during the transaction for approximately one hour (Tr. 291 (10)) and that petitioner was not the individual who had taken the cocaine (Tr. 292 (11), 293 (22)). This witness also gave a partial description of the individual involved in the transaction,[1] a description which in no way fit that of the petitioner. No testimony of any sort was introduced that the petitioner had ever distributed any cocaine or even that he had been seen in possession by anyone other than the two accusing witnesses.

The defense attacked the testimony of the identifying witnesses, *inter alia*, on the grounds that these witnesses had a strong motive to fabricate in the hope of winning leniency, since they had been facing life sentences on state charges of selling drugs. The record made

1. It was indicated that the individual appeared heavy-set (Tr. 289 (5)) and that he did not have a beard (Tr. 290 (20)). The petitioner can only be described as thin and had a distinctive red beard at the time of the alleged theft of cocaine (Tr. 16 (22)).

amply clear that this was indeed their motive for testifying (Tr. 48, Tr. 173 (12-22), Tr. 202 (23)). Further, the accusing witnesses admitted that they had both withheld information from the prosecution at various times (*e.g.* Tr. 88 (6), Tr. 49 (12), Tr. 51 (5), Tr. 202-205) and even admitted lying (*e.g.* Tr. 50 (20-25), Tr. 81 (5-15), Tr. 90 (7-16), Tr. 93 (11), Tr. 183-185, Tr. 203 (10)). Therefore, in the context of the case it is clear that the members of the jury were faced with a relatively simple issue—were the witnesses who identified the petitioner credible. The trial judge quite explicitly indicated this to the jury (Tr. 429 (23)).

The initial jury instructions were clear and comprehensive. Yet the jury found itself unable to agree. Several hours after beginning their deliberations the jury informed the trial judge that it was "hopelessly deadlocked" (Tr. 427 (6), Tr. 429 (15)). Defense Counsel moved for a mistrial, arguing that since the issue was not complex forcing additional deliberations could only be coercive. The trial judge agreed that the issue was a relatively simple one (Tr. 425 (18)), but dismissed the jury's note as "hyperbole" (Tr. 427 (6)) and determined to give an *Allen* type charge.[2] The defense was given an exception to the court's ruling (Tr. 427 (13)). After the *Allen* charge was given the trial judge dismissed the jury for the evening.

In the late afternoon of the second day of deliberations the jurors once again sent out a note informing the judge that they still felt that it would be impossible for them to agree upon a verdict. The prosecution suggested that a second *Allen* type charge be used. Counsel for the defendant made his position completely clear:

2. After the trial judge determined to give the *Allen* charge the defense attorney asked how long the judge would force the jury to deliberate into the evening. The judge indicated that he would decide that question "at [by] the seat of my pants" (Tr. 427 (23)).

> I think that any further *Allen* charge or any other charge similar to that . . . that directs them to continue deliberating after a second note indicating their impossibiliy of reaching a verdict is in a way coercive with the simple issues involved (Tr. 443 (15)).

Nonetheless, the trial judge, indicating his belief that "the jury has not deliberated as long as they should in a case like this before they come to this conclusion that they are deadlocked to the point where they can't reach agreement" (Tr. 443 (20-24)), decided to give a second *Allen* charge. An exception was given to the defense.[3]

Before giving the second *Allen* charge a colloquy developed between the judge and the prosecutor. The prosecutor indicated his belief that even if the second *Allen* charge were given it would be coercive to force the jury to deliberate past the end of that day (Tr. 443 (11)). The trial judge indicated his apparent agreement by noting, "If we don't reach an agreement by five o'clock then I am going to declare a mistrial. In the meantime I will indicate to them in the same short fashion that I did yesterday what is involved, with the so-called *Allen* charge" (Tr. 443-444). The text of what the judge told the jury is set out in the note below.[4]

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3. The opinion below indicated that the circuit panel was under the impression that petitioner had not objected to the use of the *Allen* charge, and in part based their opinion on this belief. Appendix at 2a. This is a factual error.

4. Members of the jury, in analyzing how long you have been deliberating in this case this morning, I asked you to come here about 9:30 if you recall, but we actually didn't get started until about quarter after ten. Someone was delayed. I never ascertained why because I didn't think it was important. You then went out to lunch around one o'clock and you returned after two. When I got this note it was about 2:35. Actually you have not been out that long today. So I feel that you should continue to discuss this case with the hopes of coming up with a verdict that's in conformity with your convictions and your conscience. I am going to repeat what I said to you yesterday when you left, because of the interval in time, to refresh your recollection as to this particular area.

The trial judge did not, however, declare a mistrial when the jury remained unable to reach a verdict by the

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> In the large portion of cases absolute certainty cannot be expected, although the verdict must be the verdict of each individual juror and not mere acquiescence in the conclusion of others. Yet you should examine the question submitted with proper regard and deference to the opinion of each other and you should listen to each other's opinion with a disposition to be convinced. It is your duty to decide the case if you can conscientiously do so.
> If a much larger number of jurors favor conviction a dessenting juror should consider the reasonableness of his doubt when it makes no impression upon the mind of the other jurors equally intelligent and impartial and who have heard the same evidence.
> If, upon the other hand, the majority favors acquittal, the minority should ask themselves whether they might not reasonably doubt the correctness of their judgment.
> Likewise the jurors in the majority favoring the finding for either party should ask themselves whether they might not reasonably doubt the correctness of their judgment when it makes no impression upon the minds of the minority jurors, who as I have indicated before, are equally intelligent and impartial and have heard the same evidence.
> Should you fail to agree in this verdict that is not the end of the case. It may be retried. Any future jury must be selected in the same way you were selected from the same source of jurors that you have been selected and there is no reason to believe that the case would ever be submitted to twelve men and women who are more competent to decide it than you or that the case would be tried any better or exhaustively than it has been tried here or that there is any more or clearer evidence that could be produced on behalf of either side.
> For that reason I suggest to you that you give it further consideration and I thank you for doing that as I have thanked you for what you have done in the past (Tr. 444-446).

The first *Allen* type charge was substantially identical, except for the first paragraph. The judge commented instead:

> I have a note which reads or maybe I should have said that I had a note. Here it is.
> We are hopelessly deadlocked, and it is signed by the foreperson. I want to compliment the jury for the serious manner in which you are attending to your chores in this case. I will indicate to you just as a trivia matter that I have been in this business for about 29 years, fifteen years in the State court and fourteen years here in the Federal court. I have been dealing with jurys during that time. It is not unusual for a jury to feel that they have reached the end of the road. In this case, which is essentially a very simple case your duties are really simple in nature, although they may be hard to perform. There is essentially, in the case, a very serious question of fact which must be decided by you. I suppose in a layman's terms you would say well you either believe the Cohen's and the Brown's or you believe the fact that the case has not been proven beyond a reasonable doubt. I can understand the note coming in. But you realize that you have only been out less than two hours on a case that's taken a number of days to try (Tr. 429-430).

end of the day. Instead, over the objections of defense counsel that to do so would be coercive, the trial judge announced that he intended to force the jury to return for yet another day of deliberations (Tr. 450). Unknown to defense counsel at the time, and apparently unknown to the trial judge, was the fact that *Yom Kippur* was to begin at sundown of the following day.

Thus, after two *Allen* type charges and with the possible realization on the part of Jewish jurors that they would be forced to deliberate past the start of *Yom Kippur*, a third day of deliberation began. After nearly two hours of additional deliberation the jury finally reached a unanimous verdict, and found petitioner guilty. The petitioner appealed his conviction on the ground, *inter alia*, that the two *Allen* charges used were unduly coercive in the context of the trial. In a brief, *per curiam* opinion, the Second Circuit Panel affirmed his conviction, mistakenly finding that no objection had been made below to the two *Allen* charges and indicating that they had examined the wording of the two supplemental charges and that "neither was unfair or unduly coercive" (Appendix at 2a).

REASONS FOR GRANTING THE WRIT

A) *There is a Direct Conflict Between the Ninth and the Second Circuits Concerning whether it is Impermissibly Coercive to Give a Second Allen type Charge[5] Where a Jury Has Reported Itself Unable to Reach a Verdict.*

If this case had arisen in the Ninth Circuit, the conviction of the petitioner would have been reversed as having been coerced. Yet the Second Circuit has recently put itself in conflict with the Ninth by holding that the giving of two *Allen* type charges is not impermissibly coercive where the jury has twice announced deadlock. *United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) (holding that the giving of two *Allen* type charges was inherently coercive upon a jury) and *United States v. Robinson*, 560 F.2d 507, 517 (2nd Cir. 1977), *cert. den.*, 46 U.S.L.W. 3262 (October 11, 1972)[6] (holding that two uses of this charge need not be considered unduly coercive). Consequently, since this case arose in the only circuit which has approved of such a practice, petitioner's conviction was allowed to stand.

In *Seawell* the context in which the two *Allen* type charges were given was, if anything, less egregiously co-

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5. There are a number of different versions of the so-called *Allen* charge, but the term is generally meant to comprehend a charge similar to that approved in *Allen v. United States*, 164 U.S. 492 (1896). This charge is also known by the appellations "hanging instruction" (*Levine v. Headlee*, 148 W. Va. 323, 134 S.E.2d 892 (1964)), the "dynamite charge", the "shotgun instruction", the "third degree instruction", or the "nitroglycerin charge" because it is thought that the charge can "blast a verdict out of a jury otherwise unable to agree that a person is guilty." *United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972).

6. Apparently the Petition for *Certiorari* filed with the court by the petitioner in *Robinson* did not question the use of two *Allen* type charges. 46 U.S.L.W. 3056-7 (August 16, 1977). Thus this petition would appear to raise this issue before the Court for the first time.

ercive than the context of the present case, yet the Ninth Circuit noted that:

> Problems arising from the inherently coercive effect of the *Allen* charge have caused other courts of appeals and state courts to prohibit or resrict severely its use. . . . [E]ven in its most acceptable form the *Allen* charge "approaches the ultimate permissible limit." [cite omitted]. We conclude that permitting it to be given twice in a federal prosecution would be an unwarranted expansion of its use.
>
> If the charge is to pass muster, there is little need to repeat it save at a jury's request. . . . Repetition of the charge, together with the jury's second deadlock is almost certain to convey the thought that by failing to come to an agreement—by once again reporting themselves at an impasse—the jurors have acted contrary to earlier instructions as that instruction was properly to be understood. . . . We believe that the defendant's right to an impartial jury demands a *per se* rule [against repetition].
> *United States v. Seawell*, 550 F.2d 1159, 1162-3 [footnotes omitted].

The Second Circuit, apparently unaware of the *Seawell* case, reached the opposite conclusion in *Robinson*. In a very cursory analysis (and over a strong dissent) it noted that "although the chances for coercion may increase with each successive appeal by the court to the jurors to try to reach a verdict we are unwilling to hold that a second *Allen* type charge is error *per se*." *United States v. Robinson*, 560 F.2d 507, 517.

This case is strikingly similar to *Seawell* and *Robinson*. The jury in all three cases found itself to be hopelessly deadlocked even after a modified *Allen* charge was used. The trial judge in all three cases told the jurors, in effect, that he disbelieved their considered judgment that they could not reach an opinion without doing violence

to the conscientiously held opinion of one or more members of the jury. The conviction in this case was apparently affirmed partly[7] on the basis of *Robinson*, though the brief *per curiam* opinion cited no cases. It is submitted that the Second Circuit erred in *Robinson* and consequently in its affirmance of Petitioner's conviction. It is further submitted that the Fifth and Sixth Amendments to the United States Constitution compel the result reached by the Ninth Circuit in Seawell.

A long line of cases hold that in order to meet the due process standards of the Fifth Amendment a jury must determine that the government has proven its case beyond a reasonable doubt before a defendant may be convicted. *E.g. In Re Winship*, 397 U.S. 358, 362 (1970); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *Miles v. United States*, 103 U.S. 304, 312 (1881). Similarly, an unbroken line of cases reaching back into the 1800's show that this court has consistently recognized that the requirement of unanimity on the part of jurors is one of the indispensable features of the federal[8] jury system. These two requirements undoubtedly mandated the holding of this court that supplemental jury instructions which could have coerced jurors into surrendering conscientiously held views were improper. *Jenkins v. United States*, 380 U.S. 445 (1965). Said the Court, "[T]he principle that jurors may not be coerced into surrendering views conscientiously held requires no elaboration." *United States v. Jen-*

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7. It is also clear that the affirmance was partly based upon the factual error on the part of the Circuit panel that there had been no objection to the use of the *Allen* charges.

8. This case does not require the court to determine whether the use of two supplementary charges by a state court would be unconstitutional. *Cf. Johnson v. Louisiana*, 406 U.S. 356 (1971). Neither is the court faced with the situation where a jury itself requests a supplemental charge (*United States v. Kahner*, 317 F.2d 459, 484 (2nd Cir.) or where the charge read is part of the original charge. *United States v. Washington*, 144 U.S. App. D.C., 338 F.2d 308 (1970).

kins, supra, at 446. (Adopting the views of the Solicitor General). *Cf. Bransfield v. United States,* 272 U.S. 448, 450 (1926); *Burton v. United States,* 196 U.S. 238, 307-308 (1905) (both holding that the mandate of an impartial jury requires reversal where a judge has inquired as to the division of a jury which is unable to agree).

The situation in which an *Allen* type charge is twice given must be analyzed in light of the above constitutional requirements. By definition, jury deadlocks are most likely to occur in close cases such as the one presently before the Court. One or more members of the jury, having properly been instructed as to the law of the case and as to the burden of proof and after discussing the matter with other jurors, finds him/herself with reasonable doubt as to the guilt of the accused. The jury, finding itself unable to agree on a verdict, then indicates to the judge that it is at an impasse.

Petitioner does not contend that a non-coercive, properly framed[9] supplemental jury charge at this point is necessarily coercive. But where a jury, having been instructed properly as to their duty to attempt to reach a verdict, still finds that in the minds of some jurors a reasonable doubt exists, an additional reading of any *Allen* type charge is unavoidably coercive. Rejection of the jury's second deadlock along with repetition of the charge is virtually certain to sound to jurors like a "lecture sounding in reproof." *United States v. Seawell,* 550 F.2d 1159, 1163 (1977). Additionally, the trial judge's failure to accept the decision of the jury that to reach a unanimous decision one or more of the jurors would be forced to give up conscientiously held opinions is tantamount to denying

9. Petitioner discusses possible criteria for determining what constitutes a non-coercive, properly framed supplemental jury charge elsewhere in this petition. See pages 20-22, *infra.*

their word that those opinions are conscientiously held. Further, jurors cannot fail to receive the idea that they will simply not be released until some verdict is reached.[10] This, of course, is clearly impermissibly coercive as this court held in *Jenkins v. United States,* 380 U.S. 445 (1965).

Consequently petitioner requests that the Court settle the conflict between the Ninth and Second Circuits concerning the permissibility of the use of the two *Allen* type charges by holding that the use of two such charges is inherently coercive and therefore constitutionally infirm.

B) *The Guidance of This Court is Urgently Required in order to Clarify The Current Confused State of the Law Concerning the Proper Standard of Review When Supplemental Charges are Given.*

The guidance of this Court is urgently needed in order to eliminate the "hodge-podge" of varying standards of review which have developed in the different circuits concerning the use of supplemental *Allen* type charges where the jury has reported itself in deadlock. The chaotic and confused state of the law in this area may best be illustrated by a brief examination of the standards imposed by each of the circuits.

In The District of Columbia Circuit, the traditional *Allen* charge has been replaced with the charge recommended by the American Bar Association.[11] *United States v. Thomas,* 146 U.S. App. D.C. 101, 449 F.2d 1177 (D.C.

10. In this case such an impression would have been made particularly strong by the requirement that the jury return for a third day of deliberations after they had been unable to agree subsequent to the second *Allen* charge and after several hours of additional deliberation.

11. This charge appears in *Minimum Standards for Criminal Justice, Trial By Jury* (Approved Draft, 1968) at Sec. 5.4. The charge, which is considerably less harsh than the *Allen* charge, appears at p. 22 of this brief, *infra.*

Cir. 1971) (*en banc*). The Court, in an exercise of its supervisory power, stated that it would reverse verdicts which were reached after a non-complying charge was given.

Using a different approach, the First Circuit in *United States v. Flannery*, 451 F.2d 880 (1st Cir. 1971), placed substantial limitations around the *Allen* charge by requiring 1) the elimination of remarks addressed exclusively to minority jurors unless remarks were also addressed to majority jurors, 2) the elimination of any suggestion that the case must be decided sooner or later by a jury, and 3) a reinstruction on the prosecutor's burden of proof beyond a reasonable doubt whenever an *Allen* charge is given. In the subsequent case of *United States v. Angiulo*, 485 F.2d 37 (1st Cir.) *cert. denied*, 419 U.S. 896 (1973), the First Circuit reaffirmed its *Flannery* standards and reversed a case involving two *Allen* charges.

Unlike most of the other circuits, the Second Circuit has had little difficulty in upholding the use of almost any version of the *Allen* charge. Although *United States v. Kenner*, 354 F.2d 780 (2d Cir. 1965) *cert. denied* 383 U.S. 958 (1966), indicated that the court would take a strict view of *Allen* charges, the circuit has readily affirmed subsequent uses. See, *e.g.*, *United States v. Hynes*, 424 F.2d 754 (2d Cir.) *cert. denied* 399 U.S. 933 (1970). This attitude recently reached its apex in the summary affirmance of a trial judge's use of two *Allen* charges. *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*), *cert. denied* (on other grounds), 46 U.S.L.W. 3262 (Oct. 11, 1977).

The Third Circuit banned future use of the *Allen* charge entirely in *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied sub nom. Panaccione v. United States*, 396 U.S. 837 (1969). *See also, Government of Virgin Islands v. Hernandez*, 476 F.2d 791 (3d Cir. 1973). The Third Circuit, unlike the District of Columbia Circuit, did not recommend the American Bar Association standards to its district judges. Instead, the circuit required use of a similar charge found at *Mathes and Devitt, Federal Jury Practice and Instructions*, Sec. 79.01 (1965).

Although the Fourth Circuit has never actually prohibited further use of the *Allen* charge, it has strongly recommended the use of the American Bar Association charge within its jurisdictions and strongly implied that further use of the *Allen* charge would be held unacceptable. *United States v. Stollings*, 501 F.2d 954 (4th Cir. 1974). Apparently, most of the district judges have complied with this request. *See, United States v. Taliaferro*, 558 F.2d 724 (4th Cir. 1977); *United States v. Dolan*, 544 F.2d 1219 (4th Cir. 1976); *United States v. Godwin*, 522 F.2d 1135 (4th Cir. 1975).

The propriety of the *Allen* charge has been extensively litigated in the Fifth Circuit. The result is a not very clear state of the law. In *United States v. Bailey*, 480 F.2d 518 (1973), the circuit, sitting *en banc*, permitted continued use of the *Allen* charge despite a vigorous dissent and the strongly anti-*Allen* sentiment of the panel below, 468 F.2d 652 (1972). Subsequent litigation has resulted in both affirmances, *see, e.g., United States v. McCray*, 528 F.2d 1029 (1976), and reversals, *see, e.g., United States v. Taylor*, 530 F.2d 49 (1976). In post-*Bailey* attempts to clarify its view, the Fifth Circuit has applauded the elimination of the second paragraph of the original *Allen* charge, *United States v. Cheramie*, 520 F.2d 325 (1975), and has stated that it "will sanction soothing and purgative additions [to the *Allen* charge],

but any verbal gilding which may plausibly be read as coercive must be disapproved," *United States v. Amaya*, 509 F.2d 813 (1975), *cert. denied*, 429 U.S. 1101 (1975).

The Sixth Circuit has stated that the *Allen* charge is properly given only within "exceedingly narrow bounds." *United States v. Scott*, 547 F.2d 334 (1977). Although it has not required more than a strict adherence to the original *Allen* language it has expressed a preference for the charge appearing in Mathes and Devitt, *Federal Jury Practice Instructions*, Sec. 79.01 (1965). *See United States v. Harris*, 391 F.2d 348, *cert. denied*, 393 U.S. 874 (1968).

Among the several circuits, the Seventh Circuit takes the strictest view of the *Allen* charge. It first prohibited the use of the *Allen* charge in *United States v. Brown*, 411 F.2d 930, *cert. denied*, 396 U.S. 1017 (1969), and required future use of the American Bar Association charge. Subsequently, in *United States v. Silvern*, 484 F.2d 879 (1973) (*en banc*), it placed further restrictions on the use of *Allen* type charges by requiring the use of a boilerplate charge and prohibiting any deviation from the required charge. Additionally, the Circuit is prohibiting the use of even the boilerplate charge unless it had been included in the judge's initial charge to the jury. *See also United States v. Chaney*, 559 F.2d 1094 (1977) (reversing for failure to follow the structures of *Silvern*).

In 1925, the Eighth Circuit frowned upon the use of *Allen* even in civil cases, *Chicago & E. I. Ry. v. Sellars*, 5 F.2d 31 (1925), but more recently it has followed Judge Blackmun's opinion in *Hodges v. United States*, 408 F.2d 543 (1969) affirming the use of *Allen* by the trial judge. Several more recent opinions indicate, however, that the American Bar Association charge is frequently used by

district judges in the circuit. *See, e.g., United States v. Singletary*, 562 F.2d 1058 (1977); *United States v. Dawkins*, 562 F.2d 567 (1977).

The Ninth Circuit has not prohibited the use of the *Allen* charge. *United States v. Peterson*, 549 F.2d 654 (1977). It has, however, taken a tough approach to poorly-timed *Allen* charges, especially when the jury has not indicated a deadlock, *United States v. Contreras*, 463 F.2d 773 (1972), and has absolutely prohibited the use of two supplementary *Allen* charges, *United States v. Seawell*, 550 F.2d 1159 (1977). The Ninth Circuit's holding in *Seawell* places it directly into conflict with the Second Circuit's view of the use of two supplementary *Allen* charges as reflected in their decisions in the present case and in *United States v. Robinson, supra*.

In a recent line of cases, the Tenth Circuit has increasingly tightened its standard of review for the use of *Allen* charges, although it has not prohibited use of the charge. In *United States v. Wynn*, 415 F.2d 135 (1969) *cert. denied*, 397 U.S. 994 (1970), the court urged trial judges to use *Allen* as part of their initial charge rather than as a supplemental charge. The *Wynn* court cited the Third Circuit's ban on *Allen, United States v. Fioravanti, supra*, with approval but refused to ban the charge itself. Shortly after Wynn, the circuit met *en banc* to decide *Munroe v. United States*, 424 F.2d 243 (1970). The *Munroe* court followed *Wynn's* refusal to ban the charge, but strongly recommended the use of the American Bar Association charge in future trials. Most recently, in *United States v. Dyba*, 554 F.2d 417 (1977), the Tenth Circuit detailed its standard of review for *Allen* charges as requiring an evaluation of at least three elements: 1) an examination of any and all colloquy be-

tween the judge and the jury foreman/woman, 2) an examination of all of the circumstances surrounding the giving of the *Allen* charge, and 3) a comparison of the charge with the American Bar Association guidelines.

It is thus unfortunately apparent that the eleven circuits have taken eleven different positions regarding the use of the *Allen* charge.[12]

Further, the uncertainty concerning supplemental charges has caused a flood of litigation concerning them, clogging the courts to the extent that two of the circuits which have banned the *Allen* charge specifically cited the burden of appellate review as a factor in their decision. See *United States v. Thomas*, 449 F.2d 1177, 1186 (D.C. Cir. 1971); *United States v. Fioravanti*, 412 F.2d 407, 417 (3d Cir.), *cert. den. sub nom. Panaccione v. United States*, 396 U.S. 837 (1969). This concern has been echoed by *dicta* in almost every other circuit. (*See, e.g., United States v. Angiulo*, 485 F.2d 37, 40 (1st Cir. 1973)) and has been confirmed by a no means exhaustive survey which shows that during the past 10 years there have been no fewer than 150 opinions rendered in the Federal Courts which deal directly with the use of the *Allen* charge (in its many formulations) in criminal cases. A list of these cases, far too

12. The situation in state jurisdictions is also confused. The Pennsylvania Supreme Court has indicated that it believes the *Allen* charge to be unconstitutional. *Commonwealth v. Spencer*, 442 Pa. 328, 275 A.2d 299 (1971). Other cases in which states have eschewed its use entirely and adopted the A.B.A. or similar standards include: *Fields v. State*, 487 P.2d 831 (Alaska 1971); *People v. Gainer*, 19 Cal. 3rd 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977); *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972); *State v. Nicholson*, 315 So. 2d 639 (La. 1975); *State v. White*, 285 A.2d 832 (Me. 1972); *People v. Sullivan*, 392 Mich. 324, 220 N.W.2d 441 (1974); *State v. Martin*, 297 Minn. 359, 211 N.W.2d 765 (1973); *State v. Blake*, 113 N.H. 115, 305 A.2d 300 (1973); *State v. Champagne*, 198 N.W.2d 218 (N.D. 1972); *State v. Patriarca*, 112 R.I. 14, 308 A.2d 300 (1973); *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975); *State v. Perry*, 131 Vt. 337, 306 A.2d 110 (1973). At least 12 other states have mandated substantial modifications of the *Allen* charge. See cases collected in *People v. Gainer, supra*, n.8.

long to be reproduced here, is included in the Appendix to this brief. See 5a. While all the circuits appear to recognize their constitutional duty to forbid charges which could have a coercive effect on the jury (*Jenkins v. United States*, 380 U.S. 445 (1965)), they have had the great difficulty in fashioning this duty into a workable standard applicable to all the various permutations which the *Allen* charge has taken. Petitioner submits that it would aid the circuits immensely if this court were to elucidate such standards. Standards are a promise of consistency.

For example, the panel hearing this case below apparently felt that it was not compelled to take into consideration the entire context within which the supplemental jury charges at issue here were given.[13] Other circuits have specifically stated that the circumstances surrounding the issuance of the charge must be considered in determining whether the charge could have been coercive to members of the jury. *See, e.g. United States v. Dyba*, 554 F.2d 417, 421 (10th Cir. 1977); *Powell v. United States*, 297 F.2d 318, 322 (5th Cir. 1962). Certainly this obligation is not merely discretionary. *Cf. Jenkins v. United States*, 380, U.S. 445 (1965).

If the court had considered the factual context of this case it could not have avoided the conclusion that the charges given were indeed coercive. In light of the simplicity of the issue involved, the length of time which the jury deliberated, the assertions at two different times by the jury that it was in hopeless disagreement, the failure of the trial judge to declare a mistrial at the end of the second day as he had indicated he would, and the uncertainty which was necessarily created in the minds of

13. This can be the only conclusion from the court's brief comment that, "a careful *reading* of the two charges indicates that neither was unfair or unduly coercive." Appendix at 2a. (emphasis added). Further, as will be indicated later in this petition, it is not accepted that the wording of the charges was non-coercive.

the jurors concerning the length of time they would be forced to deliberate (exacerbated, perhaps, for some by the rapid approach of *Yom Kippur*) this is the only conclusion which could have been reached.

Even when considered in isolation, however, it is clear that the wording of the supplemental charges used in this case was coercive. A survey of the cases decided in the various circuits shows several aspects of formulation which have been used in determining whether a supplemental charge will be considered to be fair.

First, the supplemental charge must not imply that only those in the minority are under an obligation to re-examine their views. In other words, the charge must work in an even-handed manner. *See, e.g. Green v. United States*, 309 F.2d 852 (5th Cir. 1962); *United States v. Angiulo*, 485 F.2d 37 (1st Cir. 1973); *United States v. Rogers*, 289 F.2d 880 (4th Cir. 1961); *United States v. Harms*, 391 F.2d 348 (4th Cir. 1968).

Second, the charge must make clear that no juror is expected to surrender conscientiously held convictions concerning the weight and sufficiency of the evidence merely for the purpose of reaching a verdict. *See, e.g. United States v. Smith*, 353 F.2d 166 (4th Cir. 1965); *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961); *Powell v. United States*, 297 F.2d 318 (5th Cir. 1961).

Third, the trial judge should make clear to the jury that it will be discharged without having agreed on a verdict when it appears that there is no possibility of an agreement. A jury which reports deadlock would not do so unless it felt its divisions to be irreconcilable. While it may not be improper for a trial judge to request the jury to continue deliberating where he feels there is still hope, it should be impermissible to leave the jury with

the impression that they will not be released until a verdict is reached. *See, e.g. United States v. Angiulo*, 485 F.2d 37 (1st Cir. 1973); *United States v. Flannery*, 451 F.2d 380 (1971); *United States v. Duke*, 492 F.2d 693 (5th Cir. 1974). It has even been postulated that a hung jury is a constitutional right,[14] though it could perhaps be better stated that it is a necessity if we were to guarantee in the federal courts the right of a unanimous verdict which was not coerced. *Cf. Jenkins v. United States*, 300 U.S. 445 (1965).

Fourth, a factor which has been held to be coercive is the incorporation of extraneous matters into the supplemental charge. The extraneous matters which could be incorporated are legion, but the most common is undoubtedly a reference to retrial. *United States v. Smith*, 303 F.2d 341 (4th Cir. 1962); *United States v. Barley*, 460 F.2d 998 (3rd Cir. 1972); *United States v. Harris*, 391 F.2d 348 (6th Cir. 1968). *Accord, United States v. Thomas*, 449 F.2d 1177, 1183-4 (D.C. Cir. 1971). *Cf. United States v. Taylor*, 530 F.2d 49 (5th Cir. 1976) where, *inter alia*, the trial judge reminisced about his first case, and told the jurors that the case before them was "easy"). Matters not dealing with the weight or sufficiency of the evidence simply have no place before a jury.

Finally, when a supplemental charge is offered it should place the same emphasis as did the original instructions concerning the presumption of innocense and the requirement of proof beyond a reasonable doubt. *United States v. Angiulo*, 485 F.2d 37 (1st Cir. 1973); *United States v. Flannery*, 451 F.2d 880 (1st Cir. 1971); *United States v. Sutherland*, 428 F.2d 1152 (5th Cir. 1970); *Burrup v.*

14. For the expression of such views, see *Hoffman v. United States*, 297 F.2d 754, 755 (5th Cir.) (Brown, J., dissenting), *cert. den.* 370 U.S. 955 (1962); *Andrews v. United States*, 309 F.2d 127, 129-31 (5th Cir. 1962) (Wisdom, J., dissenting).

United States, 371 F.2d 556 (10th Cir.), *cert. den.* 386 U.S. 1034 (1967). Not to include such a reminder risks an impression that the trial judge is less concerned about the standard which must be met than about a quick decision.

The standards here outlined are not impossible to meet. The guidelines adopted by the American Bar Association and by the Committee on the Operation of the Jury System of the Judicial Conference of the United States (set out in the note below)[15] meet them. A convenient formulation of these standards into an actual charge may be found in *United States v. Angiulo*, 485 F.2d 37, 40, n.4 (1st Cir. 1973).

But the charge used in this case, whether the strictures listed be considered binding or only guides, must be

15. 5.4 Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(I) that in order to return a verdict, each juror must agree thereto;

(II) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(III) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(IV) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous;

(V) *that each juror who finds himself in the minority shall reconsider his views in the light of the opinions of the majority, and each juror who finds himself in the majority shall give equal consideration to the views of the minority.*

(VI) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. (Emphasized paragraph is the one recommended for insertion to that appearing in the A.B.A. *Project on Minimum Standards For Criminal Justice, Trial By Jury* § 5.4 (Approved Draft, 1968 by the Judicial Conference.) *Supplement to Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States* 2 (1969).

considered coercive, for it violates all but one of the above. While the charge did properly emphasize to the jury that all were to re-evaluate their views, the court did not indicate that no juror was expected to surrender his or her honestly held convictions. The phrase "if you can conscientiously do so" tucked in the long charge can hardly suffice. Additionally, the trial judge incorporated into the charge matters which should have had no bearing on the decision. He set the tone of his charge by chastising the jurors for beginning their morning deliberation a bit late. He ended it by an extensive reference to retrial. While the comments concerning retrial may have been, strictly speaking, accurate, they were nonetheless coercive since they tended to convey a "need" for a verdict. This impression was exacerbated by his failure to indicate any standard concerning the presumption of innocence and the degree of proof necessary in order to convict. Perhaps most coercive of all, however, was the failure of the judge to inform the jurors that they would be dismissed when it became apparent that the possibility of agreement no longer existed. In light of the fact that the jury had twice indicated to the judge that they were hopelessly deadlocked,[16] that the trial judge had not only once but twice given them a coercive charge, and that they had been recalled for yet another day of deliberations, the jury could not have reached any conclusion but that the judge intended to keep them deliberating *ad infinitum*, until a verdict was reached. This impression could easily have been avoided.

Thus it is clear that the supplemental jury charges at issue in this case were improperly and unconstitutionally coercive on the jury.

16. Despite the judge's characterization of this as "hyperbole", it nonetheless represents the view of 12 jurors who there is reason to believe were quite conscientious.

CONCLUSION

There is a direct conflict among the circuits concerning whether the use of an *Allen* type charge twice given is impermissibly coercive. Further, the circuits are in utter confusion concerning the proper standard of review against which to measure supplemental jury charges, resulting in conflicting opinions and an avoidable volume of appellate litigation. Finally, the petitioner was deprived in this case of his Fifth and Sixth Amendment rights to a fair and impartial trial by jury. Consequently a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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AARON DINES,
Of Counsel and
On The Petition

APPENDIX

OPINION

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of March, one thousand nine hundred and seventy-eight.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE WALTER R. MANSFIELD
HONORABLE JAMES L. OAKES
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

against

WILLIAM LACEY,
Defendant-Appellant.

77-1450

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

William Lacey appeals his conviction for possession of cocaine with intent to distribute in violation of the federal drug laws, after a jury trial before Judge Cannella in the

United States District Court for the Southern District of New York.

Appellant first contends that the two modified Allen charges given by the district court deprived him of a fair trial. However, a careful reading of the two charges indicates that neither was unfair or unduly coercive; and, in any case, appellant's failure to object at trial precludes his raising this point on appeal.

Appellant also argues that the district judge erred in excluding excerpts of a book written by one of the prosecution's key witnesses, Harvey Cohen. But it was within the district judge's discretion to reject this attempt to impeach this witness by use of arguably remote, extrinsic evidence concerning collateral matters. Moreover, appellant's defense was not significantly impaired by this exclusion, since Cohen had already admitted to substantial drug usage and exposure to drugs, which was the gist of the excluded evidence.

Finally, appellant's claim of insufficient evidence is unavailing in light of the direct testimony concerning appellant's knowing possession of a relatively large amount of cocaine smuggled into this country from Peru.

We have considered all of appellant's arguments and find them to be without merit. The judgment of conviction is affirmed.

/s/ Wilfred Feinberg
WILFRED FEINBERG

/s/ Walter R. Mansfield
WALTER R. MANSFIELD

/s/ James L. Oakes
JAMES L. OAKES
Circuit Judges

PETITION FOR REHEARING

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-eight.

Present:

HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDWARD WHITE, RICHARD PAGLIALONGA, ILENE BAKER, WILLIAM LACEY, MILTON THOMPSON, A/K/A "SKIP",
Defendants,

WILLIAM LACEY,
Defendant-Appellant.

77-1450

A petition for a rehearing having been filed herein by counsel for the defendant-appellant William Lacey.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

CERTIFICATION

I hereby certify that on this 2nd day of June, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage paid, to the Solicitor General of the United States, Department of Justice, Constitution Ave. and 10th St. N.W., Washington, D.C., 20530, Counsel for Respondent. I further certify that all other parties required to be served have been served.

/s/ Orzo Thaddeus Wells
ORZO THADDEUS WELLS,
Attorney for Petitioner.

10 YEAR LIST OF FEDERAL REPORTED CRIMINAL CASES INVOLVING THE *ALLEN* CHARGE

(Not Exhaustive)

Basker v. Crouse, 426 F.2d 531 (10th Cir. 1970).

Berne v. Government of Virgin Islands, 412 F.2d 1055 (3d Cir. 1969), *cert. denied*, 396 U.S. 837, 90 S. Ct. 96, 24 L.Ed.2d 87 (1969).

Brandom v. United States, 431 F.2d 1391 (7th Cir. 1970), *cert. denied*, 400 U.S. 1022, 401 U.S. 942.

Breeze v. United States, 398 F.2d 178 (10th Cir. 1068).

Bryan v. Wainwright, 511 F.2d 644 (5th Cir. 1975), *rev'g.*, 377 F. Supp. 760 (M.D. Fla. 1974), *cert. denied*, 423 U.S. 837.

Conner v. Deramus, 374 F. Supp. 504 (M.D. Pa. 1974).

Floyd v. Superintendent, Virginia State Pen., 383 F. Supp. 1103 (W.D. Va. 1974).

Goff v. United States, 446 F.2d 623 (10th Cir. 1971).

Government of Canal Zone v. Fears, 528 F.2d 641 (5th Cir. 1976).

Government of Virgin Islands v. Hernandez, 476 F.2d 791 (3d Cir. 1973).

Hale v. United States, 435 F.2d 737 (5th Cir. 1970), *cert. denied*, 402 U.S. 976, 91 S. Ct. 1680, 29 L.Ed.2d 142 (1971).

Hodges v. United States, 408 F.2d 543 (8th Cir. 1969).

Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973), *cert. denied*, 411 U.S. 986, 93 S. Ct. 2275, 36 L.Ed.2d 964.

Kersey v. State, 525 S.W.2d 139 (S. Ct. Tenn. 1975).

Marsh v. Cupp, 536 F.2d 1287 (9th Cir. 1976), *aff'g*, 392 F. Supp. 1060, *cert. denied*, 429 U.S. 981, 97 S. Ct. 494, 50 L.Ed.2d 590 (1976).

Miracle v. United States, 411 F.2d 544 (9th Cir. 1969).

Munroe v. United States, 424 F.2d 243 (10th Cir. 1970) (*en banc*).

Nordman v. National Hotel Co., 425 F.2d 1103 (5th Cir. 1970).

Posey v. United States, 416 F.2d 545 (5th Cir. 1969), *cert. denied*, 397 U.S. 946, 90 S. Ct. 965, 25 L.Ed.2d 127, *rehearing denied*, 397 U.S. 1031, 90 S. Ct. 1267, 25 L.Ed.2d 544.

Post v. United States, 132 U.S. App. D.C. 189, 407 F.2d 319 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1092, 89 S. Ct. 863, 21 L.Ed.2d 784 (1969).

Powell v. United States, 297 F.2d 318 (9th Cir. 1972).

Ralls v. Manson, 503 F.2d 491 (2d Cir. 1974), *rev'g*, 375 F. Supp. 1271 (D. Conn. 1974).

Sanders v. United States, 415 F.2d 621 (5th Cir. 1969), *cert. denied*, 397 U.S. 976, 90 S. Ct. 1096, 25 L.Ed.2d. 271.

Shaw v. Robbins, 338 F. Supp. 756 (D. Me., S.D. 1972).

Steel v. United States, 400 F. Supp. 41 (E.D. Okla. 1975).

Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969).

United States v. Abbadessa, 470 F.2d 1333 (10th Cir.).

United States v. Alper, 449 F.2d 1223 (3d Cir. 1971).

United States v. Amaya, 509 F.2d 8 (5th Cir. 1975), *cert. denied*, 429 U.S. 1101.

United States v. Angiulo, 485 F.2d 37 (1st Cir. 1973), *cert. denied*, 419 U.S. 896.

United States ex rel. Anthony v. Sielaff, 522 F.2d 588 (7th Cir. 1977).

United States v. Atkins, 528 F.2d 1352 (5th Cir. 1976).

United States v. Bailey, 468 F.2d 652 (5th Cir. 1972), *aff'd en banc*, 480 F.2d 518 (1973).

United States v. Bambulas, 471 F.2d 501 (7th Cir. 1973).

United States v. Barash, 412 F.2d 25 (2d Cir. 1969), *cert. denied*, 396 U.S. 835, 90 S. Ct. 86, 24 L.Ed.2d 86 (1969), *rehearing denied*, 396 U.S. 949, 90 S. Ct. 371, 24 L.Ed.2d 255 (1969).

United States ex rel. Barbry v. Rundle, 308 F. Supp. 628 (E.D. Pa. 1970).

United States v. Bass, 425 F.2d 161 (7th Cir. 1970).

United States v. Bass, 490 F.2d 846 (5th Cir. 1974).

United States v. Bates, 407 F.2d 590 (7th Cir. 1969).

United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975), *cert. denied*, 425 U.S. 970, 96 S. Ct. 2166, 48 L.Ed.2d 93 (1976).

United States v. Betancourt, 427 F.2d 851 (5th Cir. 1970).

United States v. Bokine, 523 F.2d 767 (5th Cir. 1975).

United States v. Bowles, 428 F.2d 592 (2d Cir.), *cert. denied*, 400 U.S. 928, 91 S. Ct. 193, 27 L.Ed.2d 188 (1970).

United States ex rel. Brothers v. Rundle, 414 F.2d 244 (3d Cir. 1969).

United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017, 90 S. Ct. 578, 24 L.Ed.2d 508.

United States v. Burley, 460 F.2d 998 (3d Cir. 1972).

United States v. Cassino, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 928, 93 S. Ct. 1363, 35 L.Ed.2d 590 (1973).

United States v. Chaney, 559 F.2d 1094 (7th Cir. 1977).

United States v. Cheramie, 520 F.2d 325 (5th Cir. 1975).

United States v. Chrysler, 533 F.2d 1055 (8th Cir.), *cert. denied*, 429 U.S. 844, 97 S. Ct. 124, 50 L.Ed.2d 115 (1976).

United States v. Contreras, 463 F.2d 773 (9th Cir. 1972).

United States v. Cowley, 425 F.2d 243 (10th Cir. 1971).

United States v. Davis, 481 F.2d 425 (4th Cir.), *cert. denied*, 414 U.S. 977, 94 S. Ct. 296, 38 L.Ed.2d 220 (1973).

United States v. Dawkins, 562 F.2d 567 (8th Cir. 1977).

United States v. Destefano, 476 F.2d 324 (7th Cir. 1973).

United States v. Diamond, 420 F.2d 688 (5th Cir. 1970).

United States v. Dixon, 135 U.S. App. D.C. 401, 419 F.2d 288 (D.C. Cir. 1969)

United States v. Dolan, 544 F.2d 1219 (4th Cir. 1976).

United States v. Domenech, 476 F.2d 1229 (2d Cir.), *cert. denied*, 414 N.S. 80, 94 S. Ct. 95, 38 L.Ed.2d 77 (1973).

United States v. Duke, 492 F.2d 693 (5th Cir. 1974).

United States v. Dyba, 554 F.2d 417 (10th Cir. 1977).

United States v. Fioravanti, 412 F.2d 207 (3d Cir.), *cert. denied sub nom. Panaccione v. United States*, 396 U.S. 837, 90 S. Ct. 97, 24 L.Ed.2d 88 (1969).

United States v. Flannery, 451 F.2d 880 (1st Cir. 1971).

United States v. Floyd, 555 F.2d 45 (2d Cir. 1977).

United States v. Fonseca, 490 F.2d 464 (5th Cir. 1974), *cert. denied*, 419 U.S. 1072, 95 S. Ct. 660, 42 L.Ed.2d 668.

United States v. Gill, 490 F.2d 233 (7th Cir. 1973).

United States v. Godwin, 522 F.2d 1135 (4th Cir. 1975).

United States v. Graydon, 429 F.2d 120 (4th Cir. 1970).

United States v. Green, 523 F.2d 229 (2d Cir. 1975).

United States v. Handy, 454 F.2d 885 (9th Cir. 1971).

United States v. Harris, 391 F.2d 348 (6th Cir.), *cert. denied*, 393 U.S. 874, 89 S. Ct. 169, 21 L.Ed.2d 145 (1968).

United States v. Hogan, 486 F.2d 222 (4th Cir. 1973).

United States v. Howell, 514 F.2d 710 (5th Cir. 1975).

United States v. Hynes, 424 F.2d 754 (2d Cir. 1970), *cert. denied*, 399 U.S. 933, 90 S. Ct. 70, 26 L.Ed.2d 804.

United States v. Jennings, 471 F.2d 13-0 (2d Cir.), *cert. denied*, 411 U.S. 935, 93 S. Ct. 1909, 36 L.Ed.2d 395 (1973).

United States v. Johnson, 139 App. D.C. 193, 432 F.2d 626 (D.C. Cir.), *cert. denied*, 400 U.S. 949, 91 S. Ct. 257, 27 L.Ed.2d 255 (1970).

United States v. Kalmanson, 481 F.2d 667 (5th Cir. 1973).

United States v. Knaack and Segoriano, 409 F.2d 418 (7th Cir. 1969).

United States v. LaRiche, 549 F.2d 1088 (6th Cir. 1977).

United States v. Lee, 509 F.2d 645 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973).

United States v. Marken, 457 F.2d 186 (9th Cir. 1972).

United States v. Martinez, 446 F.2d 118 (2d Cir. 1971), *cert. denied*, 404 U.S. 94, 92 S. Ct. 297, 30 L.Ed.2d 259 (1971).

United States v. McCray, 528 F.2d 1029 (5th Cir. 1976).

United States v. Medansky, 486 F.2d 807 (7th Cir. 1973), *cert. denied*, 415 U.S. 989, 94 S. Ct. 1587, 39 L.Ed.2d 886 (1974).

United States v. Meyers, 410 F.2d 693 (2d Cir. 1969).

United States v. Moore, 429 F.2d 1305 (9th Cir. 1970).

United States v. Moriarty, 497 F.2d 486 (5th Cir. 1974).

United States v. Orsinger, 138 U.S. App. D.C. 403, 428 F.2d 1105 (D.C. Cir.), *cert. denied*, 400 U.S. 831, 91 S. Ct. 62, 27 L.Ed.2d 61 (1970).

United States v. Ozuma-Amador, 480 F.2d 611 (5th Cir. 1973).

United States v. Peterson, 549 F.2d 654 (9th Cir. 1977).

United States v. Pope, 415 F.2d 685 (8th Cir. 1969), *cert. denied*, 397 U.S. 950, 90 S. Ct. 973, 25 L.Ed. 132 (1970).

United States v. Prentiss, 446 F.2d 923 (5th Cir. 1971).

United States v. Prince, 496 F.2d 1289 (5th Cir. 1974).

United States v. Rao, 394 F.2d 354 (2d Cir.), *cert. denied*, 393 U.S. 845, 89 S. Ct. 129, 21 L.Ed.2d 116 (1968).

United States v. Ringlowd, 497 F.2d 1250 (8th Cir. 1974).

United States v. Robinson, 419 F.2d 1109 (8th Cir. 1969).

United States v. Robinson, 560 F.2d 507 (2d Cir. 1977) (*en banc*), *cert. denied*, 46 U.S.L.W. 43541 (Feb. 27, 1978).

United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970).

United States v. Scott, 547 F.2d 334 (6th Cir. 1977).

United States v. Seasholtz, 435 F.2d 4 (10th Cir. 1970).

United States v. Seawell, 550 F.2d 1159 (9th Cir. 1977).

United States v. See, 505 F.2d 845 (9th Cir. 1974).

United States v. Silla, 555 F.2d 703 (9th Cir. 1977).

United States v. Silvern, 484 F.2d 879 (7th Cir. 1973) (*en banc*).

United States v. Simpson, 144 U.S. App. D.C. 259, 445 F.2d 735 (D.C. Cir. 1970).

United States v. Singletary, 562 F.2d 1058 (8th Cir. 1977).

United States v. Skinner, 535 F.2d 325 (5th Cir. 1976).

United States v. Skillman, 442 F.2d 542 (8th Cir.), *cert. denied*, 404 U.S. 833, 92 S. Ct. 82, 30 L.Ed.2d 63 (1971).

United States v. Smith, 399 F.2d 896 (6th Cir. 1968).

United States v. Smith, 521 F.2d 374 (10th Cir. 1975).

United States v. Smoot, 463 F.2d 1221 (D.C. Cir. 1972).

United States v. Solomon, 565 F.2d 364 (5th Cir. 1978).

United States v. Stollings, 501 F.2d 954 (4th Cir. 1974).

United States v. Stover, 565 F.2d 1010 (8th Cir. 1977).

United States v. Sutherland, 463 F.2d 641 (5th Cir. 1972).

United States v. Taliaferro, 588 F.2d 724 (4th Cir. 1977).

United States v. Taylor, 530 F.2d 49 (5th Cir. 1976).

United States ex rel. Thomas v. New Jersey, 472 F.2d 735 (3d Cir. 1973), *cert. denied*, 414 U.S. 878.

United States v. Thomas, 146 U.S. App. D.C. 101, 449 F.2d 1177 (D.C. Cir. 1971) (*en banc*).

United States ex rel. Tobe v. Bensinger, 492 F.2d 232 (7th Cir. 1974).

United States v. Tolbert, 406 F.2d 81 (7th Cir. 1969).

United States v. United States Gypsum Co., 550 F.2d 115 (3d Cir. 1977).

United States v. Washington, 144 U.S. App. D.C. 338, 447 F.2d 308 (D.C. Cir. 1970).

United States v. Wiebold, 507 F.2d 932 (8th Cir. 1974).

United States v. Williams, 444 F.2d 108 (9th Cir. 1971).

United States v. Williams, 447 F.2d 894 (5th Cir. 1971).

United States v. Wilson, 449 F.2d 1005 (D.C. Cir. 1971) (*en banc*).

United States v. Winn, 411 F.2d 415 (10th Cir. 1969).

United States v. Wolford, 444 F.2d 876 (D.C. Cir. 1971).

United States v. Wynn, 415 F.2d 135 (10th Cir. 1969), *cert. denied*, 397 U.S. 994, 90 S. Ct. 1133, 25 L.Ed.2d 402 (1970).

Webb v. United States, 398 F.2d 727 (5th Cir. 1968).

Weston v. Rose, 527 F.2d 524 (6th Cir. 1975).

No. 77-1751

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM LACEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1978. A petition for rehearing was denied on May 9, 1978 (Pet. App. 3a), and the petition for a writ of certiorari was filed on June 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the giving of a second, supplemental *Allen*-type jury instruction constituted reversible error.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 812, 841 (a) and 841(b)(1)(A). He was sentenced to imprisonment for two and one-half years, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 1a-2a).

1. The evidence showed that, by threat and coercion, petitioner and an accomplice exacted six ounces of cocaine from three persons who had smuggled the drug into the United States (Tr. 18-20, 158-163). Two eyewitnesses independently and positively identified petitioner as one of the men who had taken the cocaine (Tr. 33-34, 171-173). Moreover, a police officer testified that he had observed petitioner and his accomplice in New York City, after they had taken the cocaine (Tr. 340-341),[1] and this same

[1] A mid-trial hearing (out of the presence of the jury) revealed that on February 19, 1976 this police officer participated in the arrest of petitioner, his accomplice, and petitioner's wife. The arrest occurred after an automobile driven by petitioner had side-swiped another parked car, with two occupants, in lower Manhattan (Tr. 227-228). In the ensuing chase, the officer saw petitioner's accomplice toss two guns

officer made both an in-court identification of petitioner and identified as pictures of petitioner and his accomplice the two photographs in the photospread which the two eyewitnesses had selected (Tr. 340, 341-342).

2. Approximately two hours after it had begun deliberations the jury reported that it was "hopelessly deadlocked" (Tr. 425). Petitioner immediately moved for a mistrial. The trial judge, however, determined that the brevity of the deliberations and the probability of a third trial[2]—entailing additional time and expense—made a different course of action appropriate (Tr. 425-426). First advising counsel of his intentions and reasoning (Tr. 428), the court gave the jury a modified *Allen* charge (Tr. 429-432), excused them for the evening and suspended deliberations until the next day. The following day, after about three and one-half hours of additional deliberation, the jury reported that it was still unable to reach a verdict (Tr. 441). Petitioner again sought a mistrial, but the judge decided that the deliberations still had not taken an excessive length of time and that a restatement of the *Allen* instructions given

out of the automobile (Tr. 228-229, 231). The district court sustained petitioner's objection to the government's offer of the guns and severely limited the officer's testimony so as to insure that the jury did not learn of the events leading to the officer's observation of petitioner in the company of his accomplice (Tr. 241-247, 338-342).

[2] The second trial had terminated by the granting of petitioner's motion for a mistrial on the ground that prejudicial testimony had been introduced into evidence.

the previous day was in order (Tr. 443-446). With the exception of a note requesting additional information, nothing further was heard from the jury on that afternoon, and at 5:10 p.m. the district court excused the jurors for the day—with the instruction that they return for further deliberations the following morning (Tr. 451). At 10 a.m. the next day the jury resumed its deliberations, and, at approximately 11:50 that morning announced its guilty verdict (Tr. 453).

ARGUMENT

1. Petitioner contends that the second *Allen*-type jury instruction in this case was impermissively coercive, was in direct conflict with the rule of the Ninth Circuit, and requires review by this Court (Pet. 9). In our submission, the second *Allen*-type jury instruction was not impermissively coercive. Adequate safeguards were provided, including an instruction regarding the duty of a dissenting juror to keep his or her conscience and not simply acquiesce to the wishes of the other jurors (Tr. 430, 445). *United States* v. *Hynes*, 424 F.2d 754, 757 (C.A. 2), certiorari denied, 399 U.S. 933; *United States* v. *Robinson*, 560 F.2d 507, 517 (C.A. 2) (*en banc*), certiorari denied, February 27, 1978 (No. 77-5466). While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions should not be changed by conference in the jury room. The goal of the jury system is to secure unanimous agreement by a discussion of views, and by arguments

among the jurors themselves. *Allen* v. *United States*, 164 U.S. 492, 501. Here, the second *Allen* instruction emphasized, as did the first, that the jury's verdict should be "in conformity with your convictions and your conscience" (Tr. 444).

The trial court, moreover, rested its decision to give the supplemental charge on sound considerations. Among these was the concern with the effort and expense of going through another trial (Tr. 425), and the fact that the jury had deliberated "a very short time" (Tr. 426).[3] In sum, when considered in "context and under all the circumstances of this case, the statement was not coercive." *Jenkins* v. *United States*, 380 U.S. 445, 446.

2. Nor is this case "strikingly similar" (Pet. 10) to the facts in *United States* v. *Seawell*, 550 F.2d 1159, which led the Ninth Circuit to hold that a second *Allen*-type charge was inpermissibly coercive. In *Seawell* the jury had deliberated for two hours on a friday afternoon and then recessed for the weekend. This weekend recess allowed them at least sixty hours of reflection on the case. On the following Monday, after they had deliberated an additional one and one-half hours, the jury sent two notes to the judge, one of which read:

> [t]he jury is at a ten-to-two impasse. The two state that nothing we can say will convince

---

[3] Prior to the second *Allen* instruction, the jury had deliberated approximately five and one-half hours.

> them otherwise. What course of action should we now take?

550 F.2d at 1160. After the judge responded to the second note by having testimony reread, the jury resumed deliberations and ten minutes later sent another note to the court indicating a ten-to-two deadlock. At that point, almost three days after the start of deliberations, the first modified *Allen* charge was given. About three and one-half hours later, after some intervening discussion between the judge and jury, the judge received another note from the jury which read in part:

> No amount of argument has persuaded their convictions, these are the others who do not agree with the majority of the jurors. We therefore submit to you that we are at an impasse and are not likely to change their minds until fatigue becomes a deciding factor which we believe is neither fair to the defendant or the people.

550 F.2d at 1162. The district court, after stating that the jury, in any event, would not have to deliberate beyond either 6:30 that night or the point of fatigue, then gave the second *Allen* charge. The jury retired at 4:10 p.m. and returned a guilty verdict at 5:00 p.m.

This case is wholly different on the facts. Here the jury deliberated for only two hours before it reported that it was "hopelessly deadlocked," thus prompting the trial judge to given the first *Allen* charge. There was no "weekend for reflection" as in *Seawell*, and no additional deliberation on the following court day before the first *Allen*-type

charge. The jury in this case had only one evening for reflection and an additional two and one-half hours of deliberation before they were given the second *Allen* charge, and this evening occurred on a day when several jurors probably were preoccupied with "run-off primary day" voting and scheduled appointments (Tr. 428). After a second *Allen* charge, the jury sought additional evidence and at the end of the day was still deliberating conscientiously. The trial judge therefore permissibly concluded that continuance of deliberations the following day would be fruitful and declined to declare a mistrial, which would have led to a third costly and time-consuming trial of this case (Tr. 451). There is in this *setting* no conflict with *Seawell* requiring resolution by this Court.

Petitioner contends, however, that clarification by this Court is needed concerning the proper standard of review when supplemental jury instructions are given. Specifically, he asserts the need for guidance by this Court in eliminating what he terms to be the "hodge-podge" of varying standards of review which have developed in the different circuits concerning the use of supplemental *Allen* type charges. We recognize that the courts of appeals, in the exercise of their supervisory powers, have directed that the *Allen* charge not be given except in a substantially modified form. See *United States* v. *Angiulo*, 485 F.2d 37 (C.A. 1); *United States* v. *Thomas*, 449 F.2d 1177 (C.A.D.C.); *Government of the Virgin Islands* v. *Hernandez*, 476 F.2d 791 (C.A. 3); *United States* v.

Chaney, 559 F.2d 1094 (C.A. 7). The Fifth Circuit continues to approve the *Allen* charge, *United States* v. *Bailey*, 480 F.2d 518 (*en banc*). But no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. Moreover, all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict.

In sum, the differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. See *e.g.*, *United States* v. *Carter*, 566 F.2d 1265 (C.A. 5), certiorari denied, June 12, 1978, No. 77-1326. *E.g.*, *Dyba* v. *United States*, No. 76-1731, certiorari denied October 3, 1977; *Perez-Vega* v. *United States*, No. 75-5937, certiorari denied, 424 U.S. 970; *Lee* v. *United States*, No. 74-6345, certiorari denied, 422 U.S. 1044.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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